IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs October 30, 2007

STATE OF TENNESSEE v. BILLY R. SHELLEY

Appeal from the Criminal Court for Sullivan County
No. S46826 Phyllis H. Miller, Special Judge

No. E2007-00807-CCA-R3-CD - Filed December 19, 2007

In December 2003, a Sullivan County jury convicted the defendant of theft of property over $1,000, a class D felony. The defendant was sentenced as a Range II, multiple offender to eight years in the Department of Correction. This court affirmed the defendant's conviction and sentence on appeal. State v. Billy R. Shelley, No. E2004-00145-CCA-R3-CD, slip op. at 7 (Tenn. Crim. App. July 29, 2005), app. denied, (Tenn. Dec. 19, 2005). In February 2007, the trial court entered an order granting the defendant post-conviction relief and the right to file a delayed motion for new trial and a delayed appeal. The trial court denied the motion for a new trial, and this appeal follows. On appeal, the defendant alleges that the trial court erred in admitting certain hearsay statements into evidence during the defendant's trial. After reviewing the record, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which DAVID H. WELLES and DAVID G. HAYES, JJ., joined.

Nat H. Thomas, Kingsport, Tennessee, for the appellant, Billy R. Shelley.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; William B. Harper, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In October 2002, the defendant was indicted for theft of property over $1,000 after the victim alleged that the defendant stole his automobile. Billy R. Shelley, slip op. at 2. The facts of the case were summarized by this court on the initial direct appeal as follows:

On November 15, 2002, Larry Hammonds, Jr. was living in a mobile home located at 390 Barnett Drive in Kingsport. At approximately 5:30 a.m., he went outside and started his recently purchased 1991 Mazda 626 to clear the windows of frost and ice. He left the car running and went back inside his mobile home. Inside only ten to fifteen seconds, Hammonds heard a "thud." At trial Hammonds testified:

> It sounded like a door closed. Didn't know what it was. I went to the front bedroom, seen somebody in front of the trailer. Went out the side door, went over, and I seen Billy Ray Shelley getting into my car. And I was - - by the time he was at my car, he had his hand upon the door, I was in front of my girlfriend's car and he just getting in and got it in drive. He hit the front of my trailer, the tongue . . . then stuck it in reverse.

He described the person who stole his car as having long brown hair and wearing a black leather jacket and testified that he saw the side of the person's face. Hammonds' porch light and that of a neighbor provided the only lighting. At trial, Hammonds testified that he had lived at the mobile home park for two weeks prior to the incident and that he had seen the Appellant several times and knew that the Appellant lived in a neighboring trailer but did not know the Appellant's name. Hammonds stated that the Appellant ran into a couch sitting in his own driveway and drug it a distance before backing into a meter and running over some cinder blocks. He also testified that he tried to chase the car on foot, and, when this attempt failed, he called 911 on his cell phone.

Soon thereafter Officer Jeff Sluss with the Kingsport Police Department arrived at the scene. As Officer Sluss sat in his patrol car talking to Hammonds, a man in a black leather jacket with long brown hair approached. Hammonds alerted the officer "this is the guy that stole my car" and saw the man drop something on the pavement. The Appellant approached the police car and asked what was going on. Officer Sluss told the Appellant to go to his residence and that they would talk in a few minutes. He then told Hammonds to retrieve what the Appellant had dropped, and Hammonds verified that the item was his car keys. Officer Sluss transported Hammonds to a vehicle he had seen on his way to the mobile home community, which was parked at the dead end of Barnett Drive, less than one mile way. Hammonds identified the car as belonging to him.

Id. at 2-3. The jury convicted the defendant, who was sentenced to eight years in the Department of Correction. Id. at 2. Because the defendant's trial counsel did not file a motion for new trial, id. at 2 n.1, this court treated as waived on appeal all issues except for sufficiency of evidence and length and manner of sentence, id. at 2-3. This court affirmed the defendant's conviction and sentence on appeal. Id. at 7.

At some point following the defendant's initial direct appeal, the defendant filed a pro se petition for post-conviction relief, alleging ineffective assistance of trial counsel.[1] On January 19, 2007, following the appointment of counsel and the filing of an amended post-conviction petition, the trial court held a hearing on the defendant's petition. At that hearing, the defendant testified that he had intended to appeal his conviction, but he did not hear from his trial counsel until after the time had expired to file a motion for new trial. The defendant also testified that he intended to raise issues other than sufficiency of the evidence and sentencing in his new trial motion. On February 7, 2007, the trial court issued an order granting the defendant post-conviction relief and the right to file a delayed motion for new trial and a delayed appeal.

In his motion for new trial, the defendant alleged that the trial court erred in "allowing the State to introduce a hearsay written statement (i.e., a sales slip . . . reflecting the terms of the purchases of the alleged victim's . . . vehicle)," and in "allowing the alleged victim to testify to the jury about certain hearsay statements and conversations between he and the investigating police officer." The trial court held a hearing on the defendant's motion, at which no evidence was presented. At the conclusion of the hearing, the trial court denied the defendant's motion. This appeal follows.

ANALYSIS

On appeal, the defendant again asserts that the sales slip and conversations between the victim and the investigating officer were hearsay and improperly admitted into evidence. The state counters that because the defendant has not included the trial transcript in the record,[2] the issue should be waived. See. Tenn. R. App. P. 24(b); State v. Taylor, 992 S.W.2d 941, 944 (Tenn. 1999). However, this court on appeal may take judicial notice of the earlier direct appeal record. State ex rel. Wilkerson v. Bomar, 213 Tenn. 499, 505, 376 S.W.2d 451, 453 (1964). Therefore, despite the defendant's error, we will take judicial notice of the record of the defendant's initial direct appeal and consider the hearsay issue on its merits.

The Tennessee Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). Hearsay is not admissible unless an exception to the hearsay rule applies. Tenn. R. Evid. 802.

Regarding the sales receipt, the record reflects that during direct examination, the prosecutor showed the victim a photocopy of a "Retail Buyer's Order" from Value Auto Sales in Kingsport. The victim identified the document as the "buyer's slip" to his vehicle, a 1991 Mazda 626, and noted that the document was dated January 16, 2002. The prosecutor then asked the victim how much he

[1] None of the defendant's post-conviction petitions appear in the record.

[2] The record in this case consists of two volumes: the technical record and the transcript of the hearing on the motion for new trial.

paid for the car. Before the victim could answer, the defendant's trial counsel objected, noting that introducing a sales receipt was not the proper way to prove the car's value. At a bench conference, defense counsel informed the prosecutor that "I think the document is inadmissible, but I think you could ask [the victim] how much he paid for [the vehicle]." After the bench conference, the prosecutor again asked the victim how much he paid for the automobile. The victim replied that he paid $4,195.00 for the vehicle. The prosecutor then moved to admit the copy of the buyer's order, which was not signed by a representative from Value Auto Sales, into evidence. The defendant did not raise an additional objection to the document, and it was admitted into evidence.

It appears from the record that the state initially attempted to introduce the sales receipt to prove the price which the victim paid for his vehicle. As such, the sales receipt appears to fit the definition of hearsay established by Rule 801(c). The business records exception of Rule 803(6) does not apply; although the buyer's order appears to be a document that Value Auto Sales created in the ordinary course of its business, the copy of the order was not authenticated by a representative of the business either through testimony or affidavit, as is required by Rule 803(6). However, the record reflects that state moved that the order form be admitted into evidence after the victim testified as to the amount her paid for the vehicle. The victim's testimony, standing alone, is sufficient to establish the value of property in theft cases. See State v. Keith Salter, No. W2004-01255-CCA-R3-CD, slip op. at 5 (Tenn. Crim. App. June 7, 2005), app. denied, (Tenn. Dec. 5, 2005); reh'g denied, (Tenn. Feb. 6, 2006); State v. Bobby R. Dyer, No. M2002-03140-CCA-R3-CD, slip op. at 3 (Tenn. Crim. App. May 14, 2004); Tenn. R. Evid. 701(b). Therefore, the proffered buyer's order, while hearsay, was cumulative to the victim's testimony, and any error on the part of the trial court in admitting this evidence was harmless. See Tenn. R. Crim. P. 52(a). The defendant is accordingly denied relief on this issue.

Regarding the conversation between the victim and the investigating officer, it appears that the only testimony to which the defendant objects on appeal is the victim's testimony that the investigating officer told the victim to pick up some keys that the defendant allegedly dropped to determine whether the keys actually belonged to the victim. At trial, when the victim first attempted to recall his statements to the investigating officer, the defendant's trial counsel objected to the statement, and the trial court sustained the objection. The victim then testified that he saw the defendant take an object out of his jacket and throw the object onto the ground. The victim testified that the investigating police officer "told me to go see if it was my keys" that had been thrown onto the ground. The defendant did not object to this testimony.

Initially, we note that a party's failure to make a contemporaneous objection to trial testimony will typically result in a waiver of the issue on appeal. Tenn. R. App. P. 36(a); State v. Thompson, 36 S.W.3d 102, 108 (Tenn. Crim. App. 2000). Here, the defendant did not make a contemporaneous objection to the specific statement he challenges on appeal; namely, that the police officer told the victim to pick up the car keys and determine whether they in fact belonged to the victim. The defendant also did not object to any testimony from the investigating officer regarding conversations that took place between the officer and the victim. Furthermore, while cross-examining the victim, the defendant asked the victim several questions about testimony he had made in a preliminary

hearing, testimony which included statements he made to police identifying the defendant as the perpetrator. In light of this testimony, the state on redirect asked the victim additional questions regarding statements he made to police. This testimony regarding the victim's prior consistent statements was admissible to rehabilitate the witness' credibility. State v. Benton, 759 S.W.2d 427, 433-34 (Tenn. Crim. App. 1988). In light of this evidence, we conclude that the trial court did not abuse its discretion in admitting the victim's testimony regarding his statements to police. The defendant is therefore denied relief on this issue.

CONCLUSION

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

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D. KELLY THOMAS, JR., JUDGE